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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
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Re: *Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Ms. Dortch:

Over the course of the above-referenced proceeding, incumbent local exchange carriers ("ILECs") and their representative associations have endeavored to persuade the Commission that ILECs are entitled to Commission regulation of the rates, terms, and conditions for their attachments to electric utility poles. In response, the Edison Electric Institute ("EEI") and others have consistently demonstrated that the ILECs' position is contrary to the clear and explicit language of Section 224 of the Communications Act, and thus any regulation of the rates, terms, and conditions for ILEC attachments is beyond the authority expressly granted to the Commission by Congress.

Nevertheless, ILEC interests continue to advance a complex and convoluted analysis of Section 224 that turns the plain language of the statute on its head in an effort to obtain a regulatory benefit to which they are explicitly not entitled. In so doing, the ILECs have created confusion regarding the interpretation of these simple and straightforward statutory provisions. If the Commission were to accept the ILECs' argument and impose the type of regulation that the ILECs now seek, the Commission would overstep its clearly delineated authority under Section 224 and impinge upon – if not completely usurp – long-standing and well-established State authority and jurisdiction over the relationship between ILECs and electric utilities with respect to pole attachments, pole infrastructure, and access to rights-of-way.

Accordingly, EEI hereby provides additional discussion and analysis of the statutory prohibitions against Commission regulation of the rates, terms, and conditions for ILEC pole attachments. As discussed below, these prohibitions are clear, unambiguous, and not subject to interpretation by the Commission.

The ILECs' Interpretation of Section 224 is Neither Logical nor Reasonable

The ILEC argument is founded on the assertion that the term "telecommunications carrier" and the phrase "provider of telecommunications services" have separate and distinct meanings, both under the Communications Act generally and within the parameters of Section 224 specifically.

Section 224(a)(5) of the Act clearly states "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)."[1] Thus, as the ILECs acknowledge, they do not have a right to nondiscriminatory access under Section 224(f)(1) because nondiscriminatory access must only be provided to a "telecommunications carrier."[2]

With respect to the rates, terms, and conditions of attachment, however, the ILECs point first to Section 224(a)(4), which defines a "pole attachment" as "any attachment by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[3] The ILECs then carry this definition into Section 224(b), which states that the Commission "shall regulate the rates, terms, and conditions for pole attachments [*i.e.*, any attachment by a 'provider of telecommunications service'] to provide that such rates, terms, and conditions are just and reasonable."[4]

The ILECs argue that the use of the term "provider of telecommunications service" rather than the term "telecommunications carrier" in the definition of "pole attachment" means that Congress intended the Commission's general regulatory authority under Section 224(b) to apply to attachments by *all* providers of telecommunications services, including ILECs.

Therefore, according to the ILECs, Congress intended to confer on ILECs the entitlement to Commission-regulated rates, terms, and conditions for their pole attachments, yet Congress at the same time intentionally *denied* ILECs the right to nondiscriminatory access to poles for making their attachments. This cannot be considered a plausible interpretation of Section 224 because the result is illogical and creates an inherent contradiction within the statute.

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[1] / 47 U.S.C. § 224(a)(5).

[2] / 47 U.S.C. § 224(f)(1).

[3] / 47 U.S.C. § 224(a)(4) (emphasis added).

[4] / 47 U.S.C. § 224(b).

The Plain Language of the Statute Clearly Excludes ILEC Attachments From the Scope of the FCC's Regulatory Authority

As EEI and others have consistently demonstrated, there is no "complexity" or "ambiguity" in Section 224 regarding the attachments rights of ILECs. The plain text and structure of Section 224, the plain text and structure of the Communications Act as a whole, and the legislative history of Section 224 all demonstrate that the terms "provider of telecommunications service" and "telecommunications carrier" are synonymous and used interchangeably by Congress in Section 224.[5] Thus, the plain language of Section 224 clearly excludes ILEC attachments from the scope of the regulatory authority granted to the Commission by Congress, including the Commission's authority to regulate the rates, terms, and conditions for pole attachments.

As noted above, Section 224(a)(5) states:

> For purposes of this section, the term "telecommunications carrier" (as defined in section 3 of this Act) does *not* include any incumbent local exchange carrier as defined in section 251(h).[6]

In turn, Section 3(44) of the Act, which is cross-referenced in Section 224(a)(5), defines the term "telecommunications carrier" as follows:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).[7]

Significantly, Congress expressly stated in Section 3(44) that *any* "provider of telecommunications services" is a "telecommunications carrier," thus demonstrating that Congress clearly understood and intended these terms to be synonymous and interchangeable unless explicitly specified otherwise. In fact, Congress' inclusion of a carve-out in the definition of "telecommunications carrier" in Section 3(44) for "aggregators of telecommunications services (as defined in section 226)" provides

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[5] / *See, e.g.*, Comments of EEI and UTC, WC Docket No. 07-245 (filed Aug. 16, 2010) at 79 – 81; EEI Notice of *Ex Parte* Presentation, WC Docket No. 07-245 (filed March 3, 2011); *See also* Reply Comments of the Alliance for Fair Pole Attachment Rules, WC Docket No. 07-245 (filed Oct. 4, 2010) at 80 – 96.

[6] / 47 U.S.C. § 224(a)(5) (emphasis added).

[7] / 47 U.S.C. § 153(44).

even further evidence that Congress understood and intended these terms to be synonymous.

Specifically, Section 226 of the Act defines an "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[8] Subsequent Commission orders, as well as the legislative history of Section 226, further explain that the term "aggregators" includes "hotels, motels, airports, hospitals, private payphones, and other who control the space from which telephone service is offered to end users."[9]

Section 226 was added to the Communications Act pursuant to the Telephone Operator Consumer Services Improvement Act of 1990,[10] and thus the term "aggregators" was already an established part of the statute and was well-understood by Congress when it later adopted the definition of "telecommunications carrier" in 1996. Congress therefore included the reference to aggregators in its definition of "telecommunications carrier" in Section 3(44) not as a carve-out, but rather simply as a clarification that merely making a telephone available at a surcharge for use by guests or patients is not sufficient to warrant regulation as a telecommunications carrier, even though the service provider may arguably be considered to be "providing" a telecommunications service. Simply put, the "aggregator" reference in Section 3(44) has nothing to do with ILECs or any other entity that may require access to poles.

The fact that Congress chose to specifically exclude aggregators from the definition of "telecommunications carrier" demonstrates that Congress expected *all other* "providers of telecommunications services" to be deemed "telecommunications carriers," thus making these terms synonymous under the Act. Because these terms have the same meaning, Section 224(a)(5) of the Act can only be read as precluding the Commission from regulating the rates, terms, and conditions of ILEC pole attachments.

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[8] / 47 U.S.C. § 226(a)(2).

[9] / *National Telephone Services, Inc. Petition for Declaratory Ruling that the Untariffed Payment of Commissions by Dominant Carriers to Customers Violates Section 203 of the Communications Act*, File No. ENF-88-12, Memorandum Opinion and Order, 8 FCC Rcd 654 note 1 (1993); *See also Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Order on Reconsideration, 16 FCC Rcd 22314 (2001). The legislative history of Section 226 defined an "aggregator" as "anyone that makes telephones available to the public for operator-assisted long distance telephone calls," not including "those who make telephones available to visitors as a courtesy." H.R. REP. NO. 101-213, at 15 (1989).

[10] / Pub. L. No. 101-435, 104 Stat. 986 (1990).

This point can be illustrated through the use of USTelecom's technique of using brackets to insert relevant definitions into the provisions of Section 224.[11] Thus, as USTelecom would have it, if Section 224(b)(1) is to be read as follows:

> …[T]he Commission shall regulate the rates, terms, and conditions for pole attachments [defined as "any attachment by a cable television system or a provider of telecommunications service"] to provide that such rates, terms and conditions are just and reasonable …

Then Section 224(a)(5) must be read as follows:

> For purposes of this section, the term "telecommunications carrier" (as defined in section 3 of this Act) [defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)"] does *not* include any incumbent local exchange carrier as defined in section 251(h).

As this example demonstrates, Section 224(a)(5) clearly precludes ILEC attachments from the provisions of Section 224(b)(1). Accordingly, the plain language of the statute is clear, unambiguous, and not subject to interpretation by the Commission.[12]

Furthermore, the ILEC argument that the terms "telecommunications carrier" and "provider of telecommunications services" have separate and distinct meanings creates inconsistencies and internal contradictions among other provisions of the Communications Act.

For example, Section 251(b)(4) of the Act states that each local exchange carrier has the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[13] According to the ILEC argument, the use of the term "provider of telecommunications service" in this provision would mean that local exchange carriers would have a duty to afford access to ILECs pursuant to Section 251(b)(4). However, as the ILECs themselves concede,[14] ILECs do <u>not</u> have a right to nondiscriminatory access under Section 224 because

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[11] / *See, e.g.*, USTelecom *Ex Parte* Presentation, WC Docket No. 07-245 (filed March 10, 2011), Attachment at 5.

[12] / *See Chevron v. NRDC*, 467 U.S. 837 (1984).

[13] / 47 U.S.C. § 251(b)(4).

[14] / *See, e.g.*, USTelecom *Ex Parte* Presentation, WC Docket No. 07-245 (filed March 10, 2011).

nondiscriminatory access must only be provided to a "telecommunications carrier."[15] Because the ILECs' interpretive approach would impose a duty on other local exchange carriers under Section 251(b)(4) to provide access to entities that do not have a right to access under Section 224 (*i.e.*, ILECs), an inconsistency is created between two separate provisions of the Communications Act.

However, because the terms "telecommunications carrier" and "provider of telecommunications services" are synonymous, no such inconsistency arises. Specifically, the duty of local exchange carriers to afford access to "providers of telecommunications service" under Section 251(b)(4) is not inconsistent with the access provisions of Section 224(f)(1) because Section 224(f)(1) uses the synonymous term "telecommunications carrier" – which, as stated in Section 224(a)(5), does not include ILECs for purposes of the pole attachment provisions of Section 224. Therefore, a local exchange carrier can deny access to an ILEC without creating any inconsistencies with its obligations under Section 251(b)(4).[16]

Moreover, the structure and language of Section 251 as a whole illustrates that Congress clearly knew how to distinguish the rights and obligations of ILECs from other telecommunications carriers without drawing artificial distinctions between the terms "telecommunications carrier" and "provider of telecommunications service."[17]

Finally, the ILECs assert that treating the terms "telecommunications carrier" and "provider of telecommunications services" as synonymous would make Section 224(b) superfluous. The only way this could be true would be if Section 224(b) addressed only ILEC attachments. However, as discussed below, Section 224(b) is in fact a general grant of authority that would not be affected by the proper application of Section 224(a)(5) to exclude ILEC attachments from rate regulation by the Commission.

Specifically, Section 224(b) is a grant of general authority to the Commission to regulate rates, terms, and conditions for pole attachments that are outside the specific

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[15] / 47 U.S.C. 224(f)(1).

[16] / The Commission reached a similar conclusion in 1996, stating, "We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4)." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16103-04 ¶ 1231 (1996).

[17] / *See FCC v. AT&T Inc.*, 562 U.S. ___ (2011) (slip op. at 9) (citing *Nken v. Holder*, 556 U.S. ___ (2009)(slip op. at 6) ("statutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'")).

provisions of Section 224(d) (attachments used by cable systems solely to provide cable service) and Section 224(e) (attachments used by telecommunications carriers to provide telecommunications services), yet are within the scope of the Commission's authority.

One example of the type of attachment that is regulated by the Commission pursuant to its Section 224(b) general authority is an attachment used by a cable company to provide comingled cable television and Internet access services.[18] A proper reading of the terms "telecommunications carrier" and "provider of telecommunications service" as having the same meaning does not affect this general authority in any way. Accordingly, the ILECs' assertion that Section 224(b) would be rendered superfluous is both baseless and flatly wrong.

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As discussed above, the plain language of Section 224 clearly excludes ILEC attachments from the scope of the regulatory authority granted to the Commission by Congress, including the FCC's authority to regulate the rates, terms, and conditions for pole attachments. Accordingly, requests by the ILEC interests for the Commission to ignore the plain language of Section 224 and take action beyond the scope of its Congressionally-delegated authority should be rejected.

If you should have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

/s/ Shirley S. Fujimoto

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[18] / *See Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

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